

Matthew Mendelsohn
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Attorneys for Plaintiffs and Putative Class

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

ROBERT GRAY and MAKRUM
GEORGE, individually, and on behalf of a
class of similarly situated individuals,

Plaintiff,

v.

BMW OF NORTH AMERICA, LLC and
BMW AKTIENGESELLSCHAFT,

Defendants.

No.: 2:13-cv-3417 (WJM)(MF)

**SUPPLEMENTAL DECLARATION OF
MATTHEW R. MENDELSON IN
SUPPORT OF PLAINTIFFS' MOTION
FOR AWARD OF ATTORNEYS' FEES,
EXPENSES AND INCENTIVE AWARDS**

I, Matthew R. Mendelsohn, under penalty of perjury, declare as follows:

1. I am a partner at Mazie Slater Katz & Freeman, LLC ("Mazie Slater") in Roseland, New Jersey. I respectfully submit this Declaration in support of Plaintiffs' motion for award of attorneys' fees, expenses and incentive awards ("Motion"). This Declaration is based on my personal knowledge of the facts set forth herein.

2. A true and accurate copy of select pages from the deposition of BMW's corporate designee, Robert Coake, is attached as **Exhibit A**.

3. After reviewing BMW's opposition to Plaintiffs' motion for attorney fees, on July 10, 2017, I contacted BMW's counsel to raise my serious concerns with representations that were repeatedly made in BMW's opposition. Specifically, BMW was taking the position that Plaintiffs' expert, Mr. Kleckner, was overestimating benefits because he should have excluded

Class Vehicles that had previously been “repaired.” Setting aside the fact that he actually did exclude such vehicles in order to present a conservative valuation, such an argument suggested that BMW’s prior efforts to fix the Convertible Top Defect were effective. That position is belied by BMW’s own testimony and multiple representations made by BMW. Accordingly, I requested that BMW withdraw such arguments, consistent with its Rule 11 obligations.

4. On July 12, 2017, BMW’s counsel responded that he “respectfully disagree[d].” On the same day, and after I sought further clarification, BMW’s counsel confirmed that “it is not nor has it ever been BMW’s position” that “the prior repairs (including prior TSBs) permanently fixed the convertible top issues.”

5. A true and accurate copy of the July 10, 2017 through July 12, 2017 email chain described above is attached as **Exhibit B**.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.



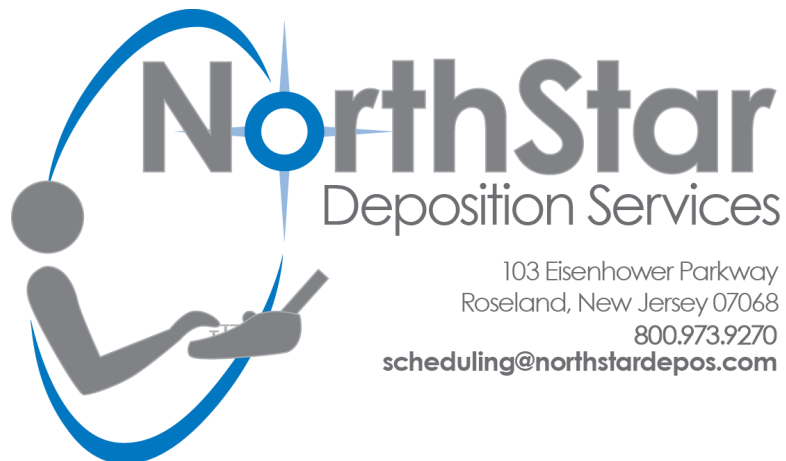
MATTHEW R. MENDELSON

Dated: July 13, 2017

EXHIBIT A

In The Matter Of:
Gray v.
BMW of North America

Robert Vincent Coake
July 13, 2016



Original File 071316Coake.txt
Min-U-Script® with Word Index

Robert Vincent Coake - July 13, 2016

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1 A. So there was all -- just like the service
2 technicians in the field, sometimes they would try to
3 please a customer and go beyond the scope of this
4 bulletin to fix the top. So everybody had their own
5 idea of what to do.

6 Q. All right.

7 MR. MENDELSON: Well, let's mark this and
8 then we'll talk about it in a little bit more detail.

9 THE COURT REPORTER: 4?

10 MR. MENDELSON: 4, yes.

11 (Coake [Exhibit No. 4](#) was marked.)

12 Q. BY MR. MENDELSON: You're being handed what
13 we just marked as [Exhibit 4](#), and I can represent to
14 you that this was produced to us in the course of, not
15 really discovery, but more in settlement negotiations,
16 as a proposed SIB that may be released to the field --
17 or will be released to the field to the extent that
18 the settlement is approved by the court. Have you
19 seen this SIB before?

20 A. Yes.

21 Q. Now, this SIB, I guess just for
22 informational purposes, is dated January 2016, and it
23 indicates that it supersedes the previous SIB that we
24 spoke about, which we marked as [Exhibit 3](#), the June
25 2011 one; is that correct?

Robert Vincent Coake - July 13, 2016

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1 A. Yes.

2 Q. Now, again, this is addressing the same
3 situation that -- same complaints that were being
4 addressed in Exhibits 2 and Exhibits 3, that the
5 convertible top does not completely open or close,
6 correct?

7 A. Correct.

8 Q. Now, whereas the rear window hall sensor and
9 the rotation of the angle sensor were previously
10 indicated as the problems in the prior three SIBs that
11 we discussed, BMW NA and/or BMW AG has made a new
12 determination, if you will, at least as related in
13 this SIB that we marked as [Exhibit 4](#), correct?

14 A. Correct.

15 Q. Can you tell me what it is that BMW has
16 determined or now determined is causing the problems
17 in the E64 convertible tops?

18 A. What do you mean causing the problems in the
19 --

20 Q. Well, this SIB, at least based on my
21 reading, institutes a fix or correction for an issue,
22 correct?

23 A. Yes.

24 Q. Okay. What is the issue that this SIB or
25 the steps that are set forth in this SIB are meant to

EXHIBIT B

Matthew Mendelsohn

From: Dalton, Christopher <christopher.dalton@bipc.com>
Sent: Wednesday, July 12, 2017 8:00 PM
To: Matthew Mendelsohn
Cc: Payam Shahian (pshahian@slpattorney.com); Rivlin, Daniel Z.; Bruno, Rosemary J.
Subject: RE: BMW

No. This is not nor has it been BMW's position.

Christopher Dalton

Shareholder

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Buchanan Ingersoll & Rooney PC

KNOW GREATER PARTNERSHIP

From: Matthew Mendelsohn [mailto:mmendelsohn@mskf.net]
Sent: Wednesday, July 12, 2017 3:04 PM
To: Dalton, Christopher
Cc: Payam Shahian (pshahian@slpattorney.com); Rivlin, Daniel Z.; Bruno, Rosemary J.
Subject: RE: BMW

Chris,

I just want to make sure the record is crystal clear on this. Is BMW now taking the position that the prior repairs (including the prior TSBs) permanently fixed the convertible top issues?

Matt

From: Dalton, Christopher [mailto:christopher.dalton@bipc.com]
Sent: Wednesday, July 12, 2017 2:59 PM
To: Matthew Mendelsohn <mmendelsohn@mskf.net>
Cc: Payam Shahian (pshahian@slpattorney.com) <pshahian@slpattorney.com>; Rivlin, Daniel Z. <daniel.rivlin@bipc.com>; Bruno, Rosemary J. <rosemary.bruno@bipc.com>
Subject: RE: BMW

Matt,

We have reviewed the assertions in your note below and respectfully disagree. Confidential Settlement Communications



Chris

Christopher Dalton

Shareholder

Co-Chair – Class Action Litigation Practice Group

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Buchanan Ingersoll & Rooney PC

KNOW GREATER PARTNERSHIP

From: Matthew Mendelsohn [mailto:mmendelsohn@mskf.net]
Sent: Monday, July 10, 2017 3:58 PM
To: Dalton, Christopher
Cc: Payam Shahian (pshahian@slpattorney.com)
Subject: BMW
Importance: High

Chris,

I have a very serious issue with the argument BMW made in its opposition to our fee application, that our expert is “double-counting” because he does not subtract the vehicles that were already “repaired.” Setting aside the fact that such an assertion is incorrect, that position is contrary to BMW’s previous representations. Now, I know your partner handled this because you were away, and perhaps he did not have a complete understanding of this issues, but it is undisputed that BMW had no real “fix” for the Convertible Top Defect prior to coming up with the Software Update. That was confirmed by BMW’s corporate designee, the warranty data showing the same vehicles repeatedly undergoing warranty repairs for the issue, and also in multiple representations made by you. That is why the Software Update was a critical component of the Settlement from Plaintiffs’ perspective. Accordingly, to argue that the Class Vehicles who had a repair under warranty do not need the Software Update or couldn’t have sustained a repair outside the warranty period is improper. Consistent with your Rule 11 obligations, this argument should be withdrawn immediately. Please confirm this argument will be withdrawn so that I do not have to raise these issues in my reply brief.

Matt

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